

		<b>DIRECTIVE 6.90</b>	
SUBJECT <b>First Amendment Right to Free Speech in Public Places</b>		NO. PAGES 3	
DISTRIBUTION All Personnel	AMENDS Directive Dated:	THIS ORDER CANCELS • New Directive	
DATE OF APPROVAL	DATE OF ISSUE 05/06/09	Applicable Accreditation Standards	
ISSUED BY: Chief Michael J. Szczerba <i>Michael J. Szczerba</i> Chief of Police Reviewed: 05/17/09			

## **First Amendment** **Right to Free Speech in Public Places**

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### **First Amendment**

#### **I. Purpose**

The First Amendment guarantee of free speech is a fundamental right under the Federal and State constitutions and a cornerstone of a free and democratic society. All members of the Wilmington Police Department must accord respect for the rights of citizens to express their views in public regardless of your personal feelings about the content of those views. There may be times, however, when a citizens speech-related conduct crosses a line and becomes disorderly conduct or criminal trespass subject to arrest. This policy is designed to help members of the department understand where that line may be drawn based on actual experiences. Members of the department must adhere to this policy when on duty and when working extra duty jobs.

For purposes of the First Amendment, there is a critical distinction between public and private property. Public parks, sidewalks, and right-of-way are considered traditional public forums and the right to free speech in those areas is at its peak. In contrast, owners of private property have the right to decide who comes on their property and for what purposes.<sup>1</sup>

#### **A. Public Property**

Citizens have a constitutional right to demonstrate or protest on public property

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<sup>1</sup> In certain specific contexts, the Delaware Constitution may protect public expression on private property, however that is outside the scope of this policy statement. Should an officer have any question regarding whether a matter falls under protected speech, he or she is encouraged to contact the City of Wilmington Law Department for guidance.

such as parks, squares, and sidewalks. This protected speech can take the form of banners, placards, handing out leaflets, singing, chanting, or setting up tables to gather signatures for a petition.

The exercise of free speech on public property does not extend to the destruction or defacement of public property or obstruction of pedestrian or vehicular traffic. The first Amendment does not protect citizens who block vehicular traffic by sitting or lying down in a street or intersection. The First Amendment does not protect citizens who gather on a public sidewalk in such a way as to deny others the right to enter or exit a building. The police have a duty and responsibility to keep public streets and sidewalks open and available for movement of vehicles and pedestrians.

Several years ago, anti-abortion protestors planned to line up along Route 1 outside Rehoboth Beach holding posters with large graphic photographs of dead fetuses. The protestors agreed to stay within the public right-of-way and not to enter the traffic lanes to distribute leaflets. Although the protest was rained out, the police department having jurisdiction expressed concerns that the photographs might cause drivers to slow down to take a closer look resulting in accidents and suggested that the protest be moved elsewhere. The police cannot infringe the free speech rights of citizens based merely on an apprehension that there might be trouble. This is called a prior restraint and is forbidden by the First Amendment. The preference is to punish the few who abuse the right of free speech after they break the law rather than suppress the speech of all beforehand. The government has a strong interest in ensuring the free flow of pedestrian and vehicular traffic on public streets. *See 11 Delaware Code '1301(1)d.* (a person is guilty of disorderly conduct for obstructing vehicular or pedestrian traffic). If, in fact, it develops that a protest along a busy public highway is causing drivers to slow down, hit their brakes, pull to the side, and nearly run into the back of other vehicles, then there may be sufficient public safety reasons for the police to intervene and ask the protestors to move further back from the road.

Labor groups have protested outside commercial establishments on a public street or right-of-way using a large inflatable rat.<sup>2</sup> The First Amendment does not protect the placement of objects on public property where the objects are permanent or not easily moved. The courts have held that the rat balloon is temporary and easily moveable and therefore was protected under the First Amendment as symbolic speech so long as there was no obstruction of pedestrian or vehicular traffic.

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<sup>2</sup> The members of these labor groups were not employees of the establishment. The rights of employees to picket or strike and where is governed by the federal labor laws. In most situations, the legality of a particular job action should be left to the determination of a court or the National Labor Relations Board. Only where trespassing clearly is involved or public passage actually is impeded should the police act, and only to the extent necessary to handle the immediate problem.

On one occasion, a labor group hoisted the inflatable rat on public property outside a school. The school asked the police department having jurisdiction to arrest the protestors because the school claimed the balloon was frightening young children in an adjoining playground. The police department declined to make any arrest because there was no evidence from the children or their parents of any imminent threat of harm to the children's well being.

Energetic, even raucous, protestors who annoy or anger audiences do not justify police stopping or interrupting a public protest. The police may stop or disperse public demonstrators or protests where clear and present danger of riot, disorder, interference with traffic upon public streets, or other immediate threat to public safety, peace or order appears. For example, where a public gathering threatened to escalate into violence and members of the hostile crowd began voicing physical threats, the courts have sanctioned police action that ended the demonstration and arrested the speaker, who defied police orders to cease and desist.

If demonstrators or protestors cross the line from protected free speech to disorderly conduct, the police must first give a clear order to disperse before making any arrests. The purpose of the fair notice requirement in the disorderly conduct statutes is to enable the ordinary citizen to conform his or her conduct to the law.

The First Amendment does not protect speech (even if the speakers are on a public street or sidewalk) directed at a single residence (the so-called a captive audience). This type of targeted picketing is different than general picketing in a residential neighborhood. The individuals right to the tranquility and privacy of the home may call for police protection from intrusive or offensive speech violating the privacy of a single home. In contrast, when citizens leave their home and travel in public spaces, they are no longer a captive audience when approached by a protestor because they can turn away, shake their head, avert their eyes, and refuse to acknowledge the speaker. In public places, the First Amendment expects individuals simply to avoid speech they do not want to hear even though it may be loud and, for a short while, difficult to avoid.

## **B. Videotaping**

Videotaping by employers, employees, the media or members of the public may be an annoyance at times, but a person is generally allowed to use a camera. A police officer should maintain his or her composure, especially as these tapes may document that no excessive force or wrongful police conduct or interference occurred.

Only when an individual's use of a camera is physically interfering with the police should action be taken against the photographer and such action must be limited to stopping the interference and, if necessary, reasonably preventing its reoccurrence.